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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/511,533

10/15/2004

Paolo Lameri

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PEARNE & GORDON LLP
1801 EAST 9TH STREET
SUITE 1200
CLEVELAND, OH 44114-3108

EXAMINER

PURDY, KYLE A

ART UNIT

PAPER NUMBER

1611

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/511,533	Applicant(s) LAMERI, PAOLO	
	Examiner Kyle Purdy	Art Unit 1611	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 19 December 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 8,9,12-23 and 26-35 is/are pending in the application.
- 4a) Of the above claim(s) 14-21 and 28-35 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 8, 9, 12, 13, 22, 23, 26 and 27 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Status of Application

1. The Examiner acknowledges receipt of the amendments filed on 12/19/2008 wherein claims 8, 9, 22 and 23 have been amended, claims 10, 11, 24 and 25 have been cancelled and claims 28-35 have been newly added.

2. Claims 8, 9, 12, 13, 22, 23, 26, 27 are presented for examination on the merits. Claims 14-21 and 28-35 stand as withdrawn. The following rejections are made.

Election by Original Presentation

3. Newly submitted claims 28-35 are directed to an invention that is independent or distinct from the invention originally claimed. Applicants original claim is directed to a method of preventing or curing a disease caused by fungi by application of an emulsion comprising a fungicide. Newly presented claims 28-35 are directed to a method of improving the efficiency of a substance having fungicidal properties, which is distinct from Applicants original election.

4. Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 28-35 are withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

Response to Applicants' Arguments

5. Applicants arguments filed 12/19/2008 regarding the rejection of claims 8-10 and 22-24 made by the Examiner under 35 USC 103(a) over Bratescu et al. (US 6528070) have been fully considered and they are found persuasive. This rejection has been overcome by amendment to

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the claims. It's noted that the rejection of claims 10 and 24 has been withdrawn due to cancellation of the claims, rather than amendment.

6. Applicants arguments filed 12/19/2008 regarding the rejection of claims 11 and 25 made by the Examiner under 35 USC 103(a) over Bratescu in view of Narayanan et al. (US 5176736) have been fully considered and they are found persuasive. This rejection has been overcome by cancellation of the claims.

7. Applicants arguments filed 12/19/2008 regarding the rejection of claims 12, 13, 26 and 27 made by the Examiner under 35 USC 103(a) over Bratescu in view of Huber-Emden et al. (US 3873703) have been fully considered and they are found persuasive. This rejection has been overcome by amendment to the claims.

New Rejections, Necessitated by Amendment
Claim Rejections - 35 USC § 103

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

9. Claims 8, 9, 22 and 23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bratescu et al. (US 6528070; of record) in view of Narayanan et al. (US 5176736; of record).

10. Bratescu is directed to emulsions comprising a blend of surfactants, active agents, oil and water. The emulsions may be employed in agricultural and pesticidal applications (see abstract). The emulsions is to comprise from about 3% to about 70% by weight of an oil and from about 15% to about 97% by weight of water (see column 4, lines 50-65 and claim 1; see instant claims

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8, 9, 22 and 23). Exemplified oils include vegetable oils such as olive and castor oil (see column 23, lines 60-65; see instant claims 10 and 24). The emulsions composition may comprise a fungicide (see column 29, line 65).

11. Bratescu fails to teach using the emulsion specifically for agricultural cultivation.

Bratescu also fails to teach the vegetable oil as being that of soybean oil.

12. Narayanan is directed to delivery systems for agricultural chemicals wherein the delivery systems are emulsifiable concentrates. It is taught that the concentrates include an oily component, and an exemplified oil is soybean oil (see column 9, lines 15-20; see instant claims 8 and 9).

13. Therefore, it would have obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Bratescu and Narayanan with a reasonable expectation for success in arriving at a method of treating fungi on plants by applying a composition comprising a fungicide, between 15% and 85% water and between 85% and 15% soybean oil. Bratescu teaches such a composition and indicates that fungicides are to be included. Although Bratescu does not expressly teach using their composition on plants to prevent fungi growth on crops, Bratescu itself provides such a motivation. Bratescu states that their composition may be employed in agricultural applications, and so to a person of ordinary skill such a recitation would serve as a sufficient motivation to use their composition for the treatment of agriculture. With respect to the use of soybean as a vegetable oil in the emulsion, this is obvious. Soybean oil is a commonly used vegetable oil in agricultural emulsions, and thus one would have been motivated to implement in the composition of Bratescu with a reasonable expectation of success. Therefore, a method of treating fungi on agriculture using a composition

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comprising a fungicide, water and oil is *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in absence of evidence to the contrary.

14. Claims 12, 13, 26 and 27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bratescu et al. (US 6528070; of record) in view of Narayanan et al. (US 5176736; of record) as applied to claims 8, 9, 22 and 23 above, and further in view of Huber-Emden et al. (US 3873703; of record).

15. Bratescu and Narayanan fail to teach the fungi being inhibited as being *Botrytis* spp as well as the agriculture being a tomato or potato crop.

16. Huber cures these deficiencies. Huber is directed to fungicidal compositions and methods of killing fungi with said compositions. The composition may be in the form of an emulsion (see column 3, line 25 and line 60). The composition is taught to be useful for combating fungi on grain, corn, rice, vegetable and fruit cultures (see column 3, lines 30-35). The composition is disclosed as capable of inhibiting growth of *Botrytis* and *Verticillium* (see column 3, lines 30-50; see instant claims 12 and 26).

17. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Bratescu, Narayanan and Huber with a reasonable expectation for success in arriving at a method of preventing and treating the growth of fungi by administering a fungicidal emulsion wherein the fungi is a *Botrytis* and is growing on a fruit or vegetable crop. Huber teaches that fungicidal emulsions can be applied to inhibit the growth of harmful fungi such as *Botrytis* on fruit and vegetable crops. Albeit Huber doesn't

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specifically teach and species of vegetable or fruit crop, it would have been obvious to any person of ordinary skill in the art to envision and apply the teachings of Bratescu and Narayanan on vegetable crops such as tomato and potato as well as on fruit crops such as peach and pear. Such a discovery that a fungicidal emulsion is useful for inhibiting growth of fungi upon such crops is not a product of innovation, but rather a product of common sense and ordinary skill in the art. Therefore, a method of inhibiting *Botrytis* and fungi growth on fruit and vegetable crops is *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in absence of evidence to the contrary.

Conclusion

18. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

19. A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

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20. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kyle A. Purdy whose telephone number is 571-270-3504. The examiner can normally be reached from 9AM to 5PM.

21. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sharmila Landau, can be reached on 571-272-0614. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

22. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

*/Kyle Purdy/
Examiner, Art Unit 1611
February 11, 2009*

*/David J Blanchard/
Primary Examiner, Art Unit 1643*